INDEX.

List of Cases.

Statutes.

Supreme Court of the United States

October Term, 1942.

No. 616.

LOUISVILLE GAS AND ELECTRIC COMPANY, - *Petitioner,*

v.

FEDERAL POWER COMMISSION, - - *Respondent.*

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Louisville Gas and Electric Company, respectfully prays this Court to reconsider the Order made on February 8, 1943, denying its petition for writ of certiorari. In support whereof petitioner submits:

I.

After the petition for writ of certiorari herein had been filed on January 5, 1943, this Court on January 11, 1943, decided the case of *The Public Utilities Commission of Ohio, et al.*, v. *United Fuel Gas Company, et al.* Petitioner, of course, did not have the benefit of the Court's opinion in the Ohio case when preparing its petition for writ of certiorari.

The decision of the court below is in conflict with the opinion and decision of this Court in the Ohio case.

The Ohio case involved the Natural Gas Act of June 21, 1938, 52 Stat. 821, 15 U. S. C. A., Sec. 717, whereas the instant case involves the 1935 Federal Power Act, 49 Stat. 847, 16 U. S. C. A., Sec. 791(a).

These two Acts are companion pieces of legislation —one covers the natural gas utility industry and the other the electric utility industry. In each of these Acts Congress delegated to the Federal Power Commission limited jurisdiction over gas and electric companies, respectively, and distinctly left to the States jurisdiction over local matters with the idea that Federal regulation should complement and not supersede or conflict with State regulation.

This Court's opinion in the Ohio case states:

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess.
>
> "Upon the undisputed facts in this record, United is plainly subject to the exclusive jurisdiction of the Federal Power Commission with re-

spect to rates and charges for natural gas transported by it from West Virginia and Kentucky to Ohio. * * *"

The Federal Power Act contains the following, which is stronger than any statement in the Natural Gas Act as to the separate spheres of Federal and State regulation of electric companies:

"* * * such federal regulation however to extend only to those matters which are not subject to regulation by the States."

The decision of the Court below in conflict and in contrast with the Ohio decision of this Court held that the Federal Power Commission had jurisdiction over petitioner's accounts and accounting system, and affirmed an order of that Commission directing a charge of $601,973.57 to surplus, notwithstanding the undisputed fact that the Company's accounts and accounting system and also its rates, services and securities were actually being regulated by the Public Service Commission of Kentucky, and the further fact that the order of the Federal Commission was directly contrary to orders of the State Commission that the said $601,973.57 should remain in the Company's accounts and not be charged to surplus.

Clearly no "harmony" is possible if both the Federal and State regulatory bodies have jurisdiction to give contradictory orders to the same electric company regarding the same matter. The court below suggested a dual set of books, which to us is unthinkable.

II.

The decision of the court below is also in conflict with the dissenting opinion in the Ohio case, which is in part as follows:

> "* * * In addition, I do not consider the order before us ripe for review. It is simply a declaration of status requiring nothing of United other than cooperation in exploration of the rate problem for the purpose of eventually setting United's rates, and is thus as properly outside the realm now as if this were 'an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.' *Rochester Telephone Corp.* v. *Commission,* 307 U. S. 125, 129. In this respect, the instant case is identical with *East Ohio Gas Co.* v. *Federal Power Commission,* 115 F. (2d) 385, 388. Unless the grounds of alleged equitable jurisdiction take it outside the scope of the Rochester case, this is not the appropriate time for review."

The 1933 and 1937 Orders of the Federal Power Commission which the court below refused to even consider on the ground that appeals had not been promptly taken were and were styled "determinations" of the "actual legitimate original cost" of the licensed project —they had no immediate legal effect, although they might be the basis of a subsequent order having a legal effect. Consequently, they were not appealable until given such legal effect by the 1939 Order directing a charge to surplus. The court below erred in holding that they were appealable when made and such decision

is in conflict with the above from the dissenting opinion in the Ohio case and also in conflict with *Rochester Telephone Corporation* v. *Commission,* 307 U. S. 125, referred to in the above quotation, and as claimed in our petition for writ of certiorari (p. 37).

III.

The case of *New Jersey Power and Light Company* v. *Federal Power Commission,* No. 329, October Term 1942, as to which this Court granted certiorari, also involved a conflict of jurisdiction between the Federal Power Commission and the State regulatory body. That is, in the New Jersey case two of the four "Questions Presented" were as follows:

> "In view of the provision in Section 201 (a) of the Federal Power Act, that Federal regulation shall not extend to matters subject to regulation by the States, has the Commission jurisdiction over Jersey Central, where it appears that all the facilities and all the activities of Jersey Central are subject to regulation by the Board of Public Utility Commissioners of New Jersey?"
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> "In view of Section 201 (a) of the Federal Power Act, and its legislative history, can the Commission exercise jurisdiction over petitioner or Jersey Central with respect to a 'matter' which the court below found is subject to regulation by the State of New Jersey, and which the appropriate regulatory body of the State of New Jersey has approved?"

In the instant case one of the main questions presented can be similarly stated as follows:

In view of the provision in Sec. 201 (a) of the Federal Power Act that "such federal regulation however to extend only to those matters which are not subject to regulation by the States," and the legislative history of the Federal Power Act, does the Federal Commission have jurisdiction over the Company's accounts and accounting system so as to order a charge to surplus of $601,973.57 when the Company's accounts and accounting system not only, but its rates, services and securities are actually being regulated by the Public Service Commission of Kentucky, and when the order of the Federal Commission is directly contrary to the orders of the State Commission.

The questions presented in this case are as important to the electric industry and to State commissions as those involved in the New Jersey case.

Petitioner respectfully asks this Court to reconsider the order made on February 8, 1943, denying its petition for a writ of certiorari and to grant such writ.

Respectfully submitted,

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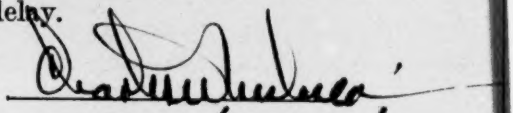
March 1, 1943.

Certificate of Counsel.

Charles W. Milner, attorney for the petitioner in the above-entitled cause, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.



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